consider, I fail to see that the Board has gone outside its powers or has acted otherwise than judicially in basing its decision on that particular consideration. It may have attached undue weight to that particular sort of evidence but that is not a point on which its decision can be criticised here for the weight to be attached to any particular piece of evidence is essentially a question of fact and not a question of law.

For reasons which I have indicated earlier in this judgment so much of the Board's Order as purports to make that Order retrospective must be set aside as going beyond the Board's powers.

The appeal, however, against so much of the Order as purports to fix the figure of the rent must be dismissed with costs.

Order accordingly.

Solicitors: *S. Seenivasagam & Sons; Maxwell, Kenion, Cowdy & Jones.*

P. ODERNAMALL & CO. v. AMERICAN PRESIDENT LINES LTD. and PENANG HARBOUR BOARD (No. 1)

[O.C.J. (Spenser Wilkinson J.) October 7, 1955]

[Penang — Civil Suit No. 227 of 1951]

Carriage of Goods by Sea — Liability of shipowners for loss to cargo.

The plaintiffs in this case were the consignees of 28 cases of textile material shipped in Japan on board the s.s. "President Monroe" for delivery at Penang. The cases were in apparent good order and condition on shipment. During the course of discharge from the ship into lighters at Penang certain minor damage or defects in regard to 7 of the cases were noted by the tally clerk employed by the ship's agents. The goods were discharged in steel lighters belonging to the Penang Harbour Board and were discharged next day into one of the Harbour Board's godowns. On receipt of the packages in the godown a certain number of these cases were noted in the Godown Book as being subject to defects. Three days later the consignees having observed that some of the cases were not in good order called for a survey and upon survey it was found that five cases contained less than the number of pieces they should have contained, there being a total shortage of 121 pieces or 2,420 yards. The plaintiffs claimed in respect of this shortage against the shipowners on the ground that they had delivered the cases in a defective condition with a shortage of 121 pieces and alternatively for damages caused by the negligence of the shipowners, their servants or agents in or about the handling, storage, carriage, custody, care and discharge of the goods. The plaintiffs claimed in the further alternative against the 2nd defendants upon an implied contract to take care of the goods and deliver them to the plaintiffs or as bailees who failed to deliver the 28 cases intact.

Held: (1) on the facts the preponderance of evidence was in favour of the shortage having arisen at some period before the goods were discharged from the ship into the lighters; (2) in any event and assuming the finding in (1) to be wrong, if the cause of the damage has not been explained, the shipowners were liable; (3) there was no evidence that any further damage or loss occurred in respect of the goods during the period of storage in the godown nor that the goods were actually received by the Penang Harbour Board in good order and condition, and therefore the case against the 2nd defendants could not succeed.

Cases referred to in the judgment:—

(1) *The Ida* (1935) P. 134.

(2) *Chartered Bank of India v. B.I.S.N.* (1909) A.C. 369.

(3) *Gosse Millard v. Canadian Govt. Merchant Marine* (1927) 2 K.B. 433.

CIVIL SUIT.

S. Thillaimuthu for the plaintiffs: Claim against 1st defendants is damages for breach of contract under Bill of Lading dated 27th March, 1951; and a breach of duty in regard to carriage of goods. Against 2nd defendants breach of contract of bailment.

R. D. Hume for the 2nd defendants: Is my friend dropping his first claim which is as agents?

Thillaimuthu: I am not dropping that claim. Order placed for cloth from Japan late in 1950 — Firm of Itoh & Co. Shippers shipped 28 cases of these textiles under the Bill of Lading in "President Monroe" of which 1st defendants are owners. Sime Darby, agents for 1st defendants. Goods received on ship in good order and condition. Plaintiffs will rely on the estoppel arising from these words. Ship arrived 21st April. 2nd defendants were engaged to take delivery. Plaintiffs received a Delivery Order from agents and went to take delivery from the Harbour Board godowns. Some of the cases were damaged. They declined to take delivery. Survey made. Survey report in bundle Ex. A. It appears that five of the cases were found to have a shortage. Will be evidence of what cases contained when shipped. All except one which contained 62 held 50 pieces. Plaintiffs' claim is for the shortage. Defendants deny the shipment in good order and condition. They rely on two exceptions under Carriage of Goods by Sea Act. Art. 4 r. 2. Ordinance No. 13 of 1950. Clause 1 of Bill of Lading. Onus of proof — Once it is proved the goods shipped in good order and condition the consignee must succeed against the carrier unless he can show that the damage or loss is excused under the Ordinance. Once this is proved the onus shifts on to the 2nd defendants.

Hume: 2nd defendants are a statutory board constituted under Ports Ordinance (Cap. 149). S. 61(1) Power to make bye-laws. Bye-laws were in fact made. Have been approved and published in Gazette on 28th August 1914. Public can obtain copy on payment. First defendants admit they have a copy. For convenience I hand in a copy of the printed booklet of Bye-Laws. Bye-law 32 has as far as I can ascertain not been altered. Receipt in this case in accordance with that Bye-law. Carver's Carriage by Sea, 9th edition, page 706. 1st defendants sued in contract under Bill of Lading. 2nd defendants are sued in the alternative:— 1. That they received the cargo as agents of the plaintiffs. I wish to make it clear that 2nd defendants are not the agents of the plaintiffs.

Thillaimuthu: It means they became damaged during 2nd defendants' custody.

Hume: As bailees we would be liable in detinue if we detained and for negligence if we had committed a negligent act. But in both cases and subject to the terms of any contract which would exempt us from liability. I will submit later that 2nd defendants are exempted under the terms of the Bill of Lading which was not exhausted until delivery of goods to plaintiffs. We could in any event only be liable for goods actually received and in the condition in which we received them. As landing agents we are bound to receive all cargo handed to us in whatever condition, unless dangerous goods.

When goods are discharged neither the tally clerks nor the Board know what is in the cases. They can only go by the outward condition. So if outward appearance of a case gives any sign of damage at all the Board for its own protection must note it. Very strong evidence of negligence would be required before they could be liable for the contents or quantity. Tally clerks in those days frequently differed — for obvious reasons. Stevedore expected to discharge as a rule at 10 tons from hatch per hour. It is done by contract — do not want interference by tally clerks. Only cursory examination after packages placed in sling. After lighterage cargo is again checked when unloaded from lighter to godown. They have then the tally sheets taken on board. Examination of these cases, some were found to be defective and looked as though they might have been tampered with and were so marked in checking in tally. Cases reported to Store-keeper and 8 were placed in the strong room. He reported to Traffic Superintendent who inspected tally sheet kept in the strong room until survey. Very important that we can only go by outward condition and we protect ourselves by the bye-laws. Bye-law also incorporates clauses of Bill of Lading. Also protected if we are agents of the ship. Agreed that Plaintiff could have taken an overside delivery order. They did not do so. Penang Harbour Board get instructions solely from the ship — they do not know who the consignors are. Bill of Lading remains in force until exhausted by delivery. Disputes between shipowners and cargo owners have gone on for years and both parties try to shift blame — **Noorsah Bawasah Merican v. William Hall & Co.** 1 Ky. 640; **Chartered Bank v. British India Steam Navigation Co. Ltd.** (1909) A. C. 369. **M.R.E.P. Md. Ebrahim v. British India Steam Navigation Co. Ltd.** (1928) S.S.L.R. 14. No difference between Penang Harbour Board and other lighter owners. Harbour Board entitled to act as Wharfingers. (Refers to Clauses in Bill of Lading). Clauses 1, 2, 12 and 22. Submit that risk after discharge from ship's tackles is not on the ship. Act, Article VII — **Elder Dempster v. Paterson Zochonis & Co.** (1924) A. C. 532. Shipowners as agents of charterers protected by clauses in Bill of Lading. At page 533. Australian case. State Reports of New South Wales 1952. Volume 52 Part 1 page 4. **Waters Trading Co. Ltd. v. Dalgety & Co. Ltd.** (1951) 2 Ll.L.R. 385. Will call Traffic Superintendent. Also two tally clerks in the ship. Also Mobile clerk who checked from lighter to godown and the store-keeper. Evidence will show that goods received in condition in which they were delivered.

I have opened the case on the law. Alternative claim: (a) As agents of plaintiffs. (b) As bailees failing to deliver on demand parts of the contents. Has been held in any case that Board are agents of the ship and not of the consignees. Evidence of Kishan Chand, Manager of plaintiff firm. Since it was ship's agents who engaged the Harbour Board to take delivery of the goods, he did not arrange for delivery to 2nd defendants. As to claim as bailees for reward, submitted we are protected by Bye-laws and by the Bill of Lading. On facts apart from Bill of Lading etc. we were presumably bailees for reward. I concede that if bailee loses goods they are liable if they do not exercise due care and diligence. But plaintiffs must first prove that these goods which were lost were entrusted to us. That they have failed to do. No evidence of goods when landed by ship to lighter. Must rely on evidence called by 1st defendants. Has any evidence proved that the goods were intact? Their own tally sheets show some cases defective. Tally kept by their own clerks — countersigned by Chief Officer of the ship. Page 17 of Ex. A shows that six of these cases were landed in a defective condition. Page 18. One secondhand case. Total seven defective cases. Seven cases were surveyed. Out of these seven only five had been tampered with. We know there was a very large number of defective cases in this ship. They only put in Deck Log something very obvious. Clerks only go by outward appearance. Chief Tally Clerk — "slightly broken" means they cannot see the contents. No doubt Harbour Board's tally clerks are more careful than the ship's. Ship's tally clerk anxious not to raise more difficulties than they need. Buckolt's evidence about friction between ship and Harbour Board. Note conditions of work of tally clerks. Not easy to note all defects. Seven cases marked defective on board the ship before they entered the lighter. Eighteen marked by P.H.B. clerk. Seven surveyed — five have shortage. Evidence of delivery into lighter. Evidence of guards and lights and so on. Inspection on arrival at godown obviously more thorough. Plaintiffs must prove that the missing goods were entrusted to our care, — otherwise their case must fail.

I. K. Meek for the 1st defendants: no allegation of shortage of weight in Statement of Claim — only short by a certain number of pieces. Contract is in Bill of Lading. Bill of Lading gives the weight. No evidence that goods received were other than that weight. No contract for carriage of any particular yardage — only weight. Plaintiffs must show a shortage of weight and have not done so. Onus is on plaintiffs to show that goods were short weight at ship's side. Plaintiffs agreed he had choice of taking delivery at ship's side. If he chooses delivery through Harbour Board that must be in accordance with Harbour Board Regulations. So plaintiffs have noticed manner in which delivery is given at ship's side, and manner of receipt given by Harbour Board. So they took the risk of not being able to have a proper check made at ship's side. If they used their own lighters they could have checked each case themselves. As it is they are unable to prove that goods were in fact short at ship's side. Goods may after a journey end up not in good order and condition without giving rise to a claim. Evidence of time for tally clerks — evidence is 10 tons per hour. Total here about 4 tons. That means 25 minutes to look at these cases. All evidence of tally clerks and checkers here shows no means of telling what the actual condition of the goods inside each case is unless a survey is held — i.e. unless the cases are opened and examined. So if consignee wants to protect himself he should send a representative on board. As to possible damage in lighter. No evidence from anyone who knows anything about this lighter. Even evidence of system can only relate to his general knowledge during his time in Penang. Was not here at relevant time. Void on a period of time — one afternoon and one night. As between 1st and 2nd defendants that leaves a doubt. Because of that gap plaintiffs have not brought home their case against us. So we are left with evidence at ship's side. Nothing — tally sheets such as strapping burst etc. which relates only to outward appearance. Numbers of cases in P.H.B. Book and Survey do not fit — at least two do not fit. This suggests additional damage.

Evidence of plaintiffs page 2 of notes. Must have been quite apparent that there was something radically wrong with the damaged cases. Yet at time checked off nothing so radically wrong that a survey was called for. Evidence of Mr. Bakham page 21 of typed notes. Says he can examine very closely. Outward condition not so defective as it was according to plaintiffs' evidence. Evidence of Chief Officer does show that there was an efficient system on board for checking damaged cargo. In Deck Log there are several entries following reports of damaged cargo. As to Bill of Lading and the law thereon — law is summed up in the **Chartered Bank**(2) case. Sufficient for 1st defendant to show they are entitled to contract in their Bill of Lading that liability will cease at ship's side. Only questions are:— Did plaintiffs exercise the option they had of taking delivery at ship's side? If so, does wording of this Bill of Lading protect them? Clause 12. Lighterage must always be at risk and expense of consignee. Not a case where consignee not on hand — a deliberate choice of delivery through Harbour Board. But clause 12 will protect if they did hand over because consignee not there. Word "authorities" can include the Harbour Board. Clause starts with words "Port Authority". Clause 22. I refer again to question of weight. There is in the bundle (page 14 of Ex. A) an invoice. Quantities and weights included. But shipowners rely entirely upon the Bill of

Lading. As to apparent good order and condition if Mate's receipt contains another remark then carrier can go behind the Bill of Lading. Apparent good order and condition has nothing to do with what is inside.

Thillaimuthu: As to claim against 1st defendant. Claim is breach of contract and breach of duty in respect of carriage of goods by sea. Claim is short delivery of many yards. Ordinance and Rules apply. Bill of Lading says goods received in apparent good order and condition. Rules to Ordinance. Article II. Responsibilities, Art. III. Rights etc., Art. IV. Art. III r. 2. No evidence of insufficient packing. Art. IV2(q) Burden is on defendants. Art. III r. 2. Once cargo received in apparent good order and condition then burden is on carrier if goods not so delivered. 30 **Halsbury**, 2nd Edn., 607. **Gosse Millard v. Canadian Government Merchant Marine** (1927) 2 K.B. 432. **Silver v. Ocean S.S. Co.** (1930) 1 K.B. 416, 432. Art. III r. 3. Carrier can qualify as to weight etc. R. 4, *prima facie* evidence. **City of Baroda** (1926), 42 T.L.R., 717; **Heyn v. Ocean Steamship Co. Ltd.** (1927), 43 T.L.R., 358. **Withers Payne's** Carriage of Goods by Sea, page 24. No evidence that goods not shipped in apparent good order and condition; and so *prima facie* they were so shipped. So unless defendant can excuse himself under the Rules he is liable. Evidence here that ship called at various ports. Only Chief Officer and other officers working five hatches. Only tally clerks saw the condition of the goods. Ship relied on the tally clerks. If theft took place from lighters then Bill of Lading exempts the ship. Damage to cases raises strong suspicion that theft took place on board. Shipowner has a duty to call for a survey. No servant of the ship looked at these cases — only tally clerks. **City of Baroda** case (1926), 25 Ll. L.R. 437 — no evidence of vigilance. There completely competent set of officers yet shipowner made liable. As to not pleading that that weight not delivered. If defendant wanted to rely on that it is for him to give evidence of the weight delivered. He accepted weight stated in Bill of Lading. Moreover they could weigh the goods before discharge. As to 2nd defendants. If 1st defendants fully discharged in good condition than our claim against 2nd defendants would arise. If proved that goods fully delivered then onus shifts to 2nd defendants. If 2nd defendants received in good order and condition then onus on them to explain loss. As to submission of Mr. Hume that he is excused under Bill of Lading. This might be the case where P.H.B. carried out their obligation cast on it by the contract of carriage. The Australian case — there the contractors were employed by the shipping company to carry out an obligation cast by contract of carriage. But in fact Harbour Board was employed by plaintiff who paid himself for the landing charges. Once freight paid to shipping company the lien went to the Penang Harbour Board. Contract under Bill of Lading came to end. If lighterers claim that Bill of Lading not exhausted then the consignee can claim his rights under the Bill of Lading. **Firestone Tire Co. (S.S.) Ltd. v. Singapore Harbour Board** (1950), M.L.J. 47.

Cur. Adv. Vult.

Spenser Wilkinson J. : — The plaintiffs in this case were the consignees of 28 cases of textile material shipped in Japan on board the s.s. "President Monroe" for delivery at Penang.

The Bill of Lading was expressly made subject to the provisions of the Carriage of Goods by Sea Act of the United States of America, and it was agreed by all parties that the terms of this Act could be assumed to be the same as the provisions of the Carriage of Goods by Sea Ordinance, 1950, which imports into all bills of lading what are commonly known as the Hague Rules. (I shall refer to these in this judgment as "the Rules").

The Bill of Lading acknowledged receipt of the cases in question in apparent good order and condition, and it has not been suggested that the cases were not in apparent good order and condition on shipment. During the course of discharge from the ship into lighters at Penang certain minor damage or defects in regard to seven of the cases were noted by the tally clerk employed by the ship's Agents. The goods were discharged into steel lighters belonging to the Penang Harbour Board and were discharged next day into one of the Harbour Board's godowns. On receipt of the packages in the godown a certain number of these cases were noted in the Godown Book as being subject to defects. Three days later the consignees having observed that some of the cases were not in good order called for a survey and upon survey it was found that five cases contained less than the number of pieces they should have contained, there being a total shortage of 121 pieces or 2,420 yards. According to the assortment or packing list supplied by the suppliers in Japan each of the cases should have contained 50 pieces, with the exception of Case No. 28, which should have contained 62 pieces. There is a typing error in the Invoice which shows Case No. 28 as containing 52 pieces, but in view of the total being given as 1,412 pieces I think there can be no doubt that the figure in the packing list is the correct one. The plaintiffs claimed in respect of this shortage against the shipowners on the ground that they had delivered the cases in a defective condition with a shortage of contents of 121 pieces, and alternatively for damages caused by the negligence of the shipowners, their servants or agents in and about the handling, storage, carriage, custody, care and discharge of the goods.

The plaintiffs claimed in the further alternative against the 2nd defendants upon an implied contract to take care of the goods and deliver them to the plaintiffs, or as bailees who failed to deliver the 28 cases intact.

I have been in some doubt as to whether it was not incumbent on the plaintiffs to prove by positive evidence not only that the goods were shipped in apparent good order but also (the damage here being a shortage of goods within the cases) that the full quantity of the goods was in fact inside the cases at the time they were shipped (see *The Ida*[1]). I have come to the conclusion, however, that even if this burden was placed upon the plaintiffs they have in this case discharged it, because there are contained in the agreed bundle of documents both an invoice giving details of the contents and also a detailed assortment list giving the details of the colours and consignment numbers of the different goods packed

into the different cases. These documents were in no way challenged by the defendants and there was at no time during the hearing any suggestion that the goods claimed had not originally been inside the cases. I think these documents having been accepted as part of the agreed documents in the case and no objection having been taken to them they constitute *prima facie* evidence that the goods set out in the invoice and assortment list were in fact packed in the cases in question.

The 1st defendants placed reliance mainly upon two arguments, one on the facts and the other on the law. On the facts their contention was that the external damage to the cases as observed during the discharge was so slight as to be really negligible, so that it could be said that the goods had been delivered overside for all practical purposes in the same good condition as that in which they were shipped. On the law the 1st defendants say that according to the conditions of the Bill of Lading their responsibility ceased when the goods left the ship's tackle, so that following the principles laid down in the case of *Chartered Bank of India, Australia & China v. British India Steam Navigation Co. Ltd.*[2] they are not liable because the damage has not been proved to have occurred before the goods left the ship.

The provisions of the Bill of Lading are not as clear as they might be and are certainly not as clear as the clause upon which the *Chartered Bank*[2] case was decided. I think, however, that it can be gathered from the various clauses relied upon that the effect of the Bill of Lading in this case was to free the shipowner from any liability in respect of any damage to the cargo caused after the goods had been discharged into lighters and my decision in this case is based upon this view.

The evidence regarding the condition of the cases at the time of the discharge from the ship into the lighter consists of the evidence of the tally clerks and of their tally sheets and of the ship's Chief Officer. I am unable to place any reliance upon the oral evidence of the ship's tally clerks regarding the condition of these cases; not because these witnesses were unsatisfactory witnesses in the usual sense of that term, but because I do not think any of them had any actual recollection at all of the condition of these cases when they were discharged from the ship in April, 1951, over four years before they gave evidence. All they were able to do was, as it were, to comment as best they could upon the remarks they had admittedly made on the tally sheets at the time. I was satisfied that neither Mong Chan Aye nor Chew Keat Cheang really remembered anything about these cases. The evidence of the Chief Checker does not help, because he did not see the cases himself and the evidence of Mr. Buckolt, the Manager of the ship's Agents, carried the matter no further. Indeed he admitted that the method of tallying in those days left a lot to be desired.

The contrast between the number of cases marked as defective in the tally sheets kept by the tally clerks appointed by the ship's Agents (whom I will refer to as the ship's tally clerks) and the tally sheets made out by the Penang Harbour Board's tally clerks is very marked. Whilst one of the ship's tally clerks noted damage only to some twenty-three cases the Harbour Board's tally clerk marked seventy-two of those cases as being not in good order and condition. It is, I think, but natural that a ship's tally clerk being employed on behalf of the shipowners would have a tendency to minimise any apparent damage, whereas the Penang Harbour Board's tally clerk's interest would be to make sure that a clean receipt should not be given by the Harbour Board in respect of any case which showed even the slightest sign of damage. I infer from these circumstances that in those instances where the ship's tally clerk has marked the cases as "slightly damaged", the question of slightness being a matter of degree, the damage was not necessarily what the consignee would call slight. Moreover, it is in my opinion quite clear from evidence of the ship's Chief Officer that it was left substantially to the discretion of the tally clerk to decide whether the damage to any particular package was sufficient to justify the calling of a survey. Here again there would be a natural tendency on the part of the tally clerk to avoid the responsibility of delaying the unloading by calling for a survey, except in the more obvious instances of damage.

In this connection I think it is important to analyse the evidence with regard to the condition of the damaged cases at the three material stages of the operation of delivery, viz. discharge at the ship's side; receipt into the Harbour Board godown; and survey on behalf of the consignees.

According to the ship's tally sheets, of the plaintiffs' consignment there were four cases which had their strapping burst, two cases with planks slightly broken and one case said to be a secondhand case.

A comparison between the state of affairs when the cases arrived at the godown (as disclosed by the Harbour Board's Godown Book) and the state of

affairs when the goods were surveyed gives the following results:—

	Arrival at Godown.	On Survey.
Case No. 10	Re-nailed	9 pieces short.
„ „ 5	Re-nailed	18 „ „
„ „ 28	Strapping burst	24 „ „
„ „ 8	No apparent damage	43 „ „
„ „ 17	Straps burst	37 „ „
„ „ 22	No damage	Contents found intact.
„ „ 21	Broken	„ „ „
„ „ 13	Re-nailed	„ „ „
„ „ 7	Broken	„ „ „
„ „ 14	Re-nailed	„ „ „

I have assumed Case No. 28 to be the case referred to without a number in the Harbour Board's book. It will be seen that of the ten cases above-mentioned eight were received at the Harbour Board godown with apparent external damage, and of these eight cases five had shortages.

It appears to me to be a fair inference that of the eight cases recorded by the Harbour Board godown as received damaged seven were those which the ship has in effect admitted by their tally sheet to be slightly defective. I think it highly probable from the evidence given as to the conditions under which the tally clerks worked that one damaged case might easily have escaped their attention. I think there is a further permissible inference that of the seven or possibly eight cases which left the ship's side in an at least partially damaged condition five were the five cases which showed the shortage. The fact that four of the cases noticed by the Harbour Board as being either broken or re-nailed had their contents intact does not appear to me to prove anything, because whoever extracted this considerable quantity of cloth from the cases might have been interrupted in their work and may have had to re-nail some cases without having had time to extract the contents. Again the fact that Case No. 8 showed no damage externally but had a considerable shortage merely seems to me to indicate that whoever extracted the material from that case was more skilful in that particular instance in re-nailing the case after the contents had been extracted than in the other instances.

It was, of course, suggested that the contents of these cases might have been extracted during the time between the discharge into the lighter and discharge into the godown, which is a period of approximately one afternoon and one night. There is, however, no direct evidence that this took place and there is evidence given on behalf of the Harbour Board that after loading from the ship the lighters were shut up by means of wooden planks covered over with a tarpaulin duly secured over the top. Evidence was also given as to the system of guards on the lighter basin and the difficulty of anyone leaving the Harbour Board premises except by the gates.

I am by no means satisfied that the damage noted during discharge was as slight as it was made out to be, and I think the evidence as a whole points to the cases in question having arrived at the Harbour Board godown in substantially the same condition as they were in when they left the ship. I cannot accept the Chief Officer's view that during the discharge the ship's officer "came very close to seeing all the cargo there is". He had to admit that when working five hatches the examination of the cargo must depend to some extent on the tally clerks. No doubt these clerks were perfectly efficient to deal with their main work, which was tallying, but in my opinion they were not the sort of people upon whom should have been placed the responsibility of deciding at a glance whether a package was or was not sufficiently damaged externally to warrant a survey.

On the evidence as a whole I am satisfied that the preponderance is in favour of the shortage having arisen at some period before the goods were discharged from the ship into the lighter. The ship admittedly called at intervening ports between the port of shipment and Penang and there may well have been pilferage at some of these ports.

Mr. Meek on behalf of the 1st defendants argued that there was a gap in the evidence as between the discharge from the ship and delivery to the consignees and that because of this gap the plaintiffs could not succeed, because the shipowners' liability ceased as soon as the goods were free of the ship's tackle. On my view of the evidence there is no such gap, but even if there were I do not think this argument is well founded, because I think that once it is shown that the shipowners have not delivered the goods overside in the same apparent good order and condition as that in which they were received they are liable for any loss, unless they can give positive evidence to bring themselves within one of the exceptions in Article IV of the Rules which would relieve them from liability. I think that in circumstances such as existed here when the cases showed indications suggesting that they had been tampered with the burden of proving that the carrier had carefully loaded, handled, stored, carried, kept and cared for the goods is thrown upon the shipowners by the combined effect of the provisions of paragraph 2 of Article III and paragraph 2(q) of Article IV of the Rules. The evidence given by the 1st defendants went solely to the question of efficiency of supervision during the discharge and did not touch the question of careful handling during the voyage.

The evidence having satisfied me that the goods did not leave the ship in apparent good order and condition the plaintiffs are in my opinion entitled to succeed, because the shipowner has failed to bring himself within any one of the exception to his obligation carefully to carry the goods.

Even if I am wrong in concluding that the loss occurred in the ship then on the alternative possibility that the cause of the damage has not been explained I think that following the case of *Gosse Millard v. Canadian Government Merchant Marine*[3] the shipowners are still liable. In that case the learned Judge found that the damage to the shipment was due to the wetting received from rain during the stay of the ship at Liverpool and alternatively he found that the cause of the damage had not been explained and upon this alternative finding he held that the defendants had not discharged the onus which was on them to negative negligence on the part of their servants and to prove some excepted peril.

A further point was raised on behalf of the 1st defendants and that is that the Bill of Lading sets out the weight of the goods shipment and that there was no claim in this case for shortage of weight, and no evidence that the goods received were other than of the weight stated in the Bill of Lading. I do not think there is much substance in this argument. It is true that the Bill of Lading contains an admission as to the weight but contains no admission as to contents of the cases; but as I have pointed out earlier in this judgment I think the admission of the invoice and packing list as agreed documents constitutes an admission in these proceedings of the contents of the packages, and if the packages in fact contained the contents alleged when the goods were shipped and there was a shortage on arrival of 2,420 yards of material it follows that there must have been a shortage of weight equivalent to this shortage of yardage. I do not think that it is material that the claim is worked out on the basis of shortage of length rather than upon shortage of weight.

For the reasons above given I hold that the plaintiffs' claim against the 1st defendants must succeed.

As I read the Statement of Claim in this case the claim against the 2nd defendants is an alternative to the claim against the 1st defendants, and if this is right my decision against the 1st defendants must result in my giving judgment in favour of the 2nd defendants.

Apart, however, from the question of pleading I am of opinion that upon the facts as I have found them the plaintiffs cannot succeed against the 2nd defendants. I have already expressed the view that the goods arrived at the Harbour Board godown in substantially the same condition as when they left the ship. With regard to the period between the reception of the goods in the Harbour Board godown and the survey of the goods on behalf of the plaintiffs the evidence is that the damaged cases were immediately placed in the strong room and kept there under lock and key. I am of opinion there is no evidence upon which it could be found that any further damage or loss occurred in respect of these goods during this period of storage. Moreover, the Harbour Board did not give clean receipts in respect of these goods and there being thus no admission of receipt in good order and condition it would, in my opinion, require very strong evidence of actual loss during the time that the goods were under the care of the Harbour Board or evidence that the goods were actually received by the Board in good order and condition to establish liability. I can find no such evidence in this case.

It is, therefore, not necessary for me to decide the interesting but difficult questions of law which were argued before me upon the question of the liability of the Penang Harbour Board when goods are lost or damaged either during the process of lightering by the Board from ship to shore or during storage until delivery to the consignee.

In the result there will be judgment for the plaintiffs against the 1st defendants and judgment in favour of the 2nd defendants. I will hear such further argument as may be necessary on the question of the amount of the judgment and interest and on the question of costs.

Order accordingly.

Solicitors: *Conaghan, Wreford & Thornton; Presgrave & Matthews; Hogan, Adams & Allan.*

P. ODERNAMALL & CO. v. AMERICAN PRESIDENT LINES LTD. and PENANG HARBOUR BOARD (No. 2)

[O.C.J. (Spenser Wilkinson J.) October 14, 1955]

[Penang — Civil Suit No. 227 of 1951]

Costs — Action against two defendants — Whether order should be made for plaintiffs to recover from one defendant the costs they will have to pay to the other defendants — Bullock Order.

In this case the learned Judge having given judgment for the plaintiffs against the 1st defendants and judgment in favour of the 2nd defendants had to consider whether an order should be made for the plaintiffs to recover from the former the costs they will have to pay to the latter.